support of his claim, he produced certain documents. There is no need to refer to them here. When Mr. Chng gave evidence for the plaintiffs, he was cross-examined at length by Mr. Cox, both on the documents that had been produced by Mr. Tan and on the claim of the plaintiffs that they had a sub-contract with Island Concrete. Mr. Lightman has submitted that all these are irrelevant matters. I cannot agree with him. The cross-examination of Mr. Chng was relevant to credit, and the facts that have emerged in the cross-examination would have been material to the defence had the alleged oral agreement of July 10, 1979 been proved by the defendants.

Now, on the evidence before me, I am satisfied that the documents produced by Mr. Tan do not show the true nature of the relationship between Island Concrete and the plaintiffs. In this context, I accept the evidence of Mr. K.S. Chung and Mr. Tan Geok Ser who said that as the solicitors for the plaintiffs they were told by the representatives of the plaintiffs when they were given instructions in this case that the plaintiffs had entered into a sub-contract with Island Concrete. But the solicitors were not told or shown the documents which Mr. Tan produced in court. Included in the documents are contracts alleged to have been made between the plaintiffs and Island Concrete without the benefit of legal advice.

On a review of the whole of the evidence on this subject, the conclusion I come to is that the arrangement the plaintiffs have with Island Concrete is similar in nature to the terms in the 1975 Agreement the plaintiffs had with the defendants. The plaintiffs have given Island Concrete a licence coupled with an interest in the land in Pulau Ubin to use and manage the land for the purposes of a granite quarry. Like the 1975 Agreement, the arrangement the plaintiffs have with Island Concrete is illegal under the Act. It is also in breach of the Temporary Occupation Licence given to the plaintiffs by the Commissioner of Lands.

I now come back to the claim of the plaintiffs. For the reasons I have given, there will be judgment for the plaintiffs (a) for the payment of the arrears due to the plaintiffs from the defendants under the 1975 Agreement; (b) a declaration that the licence granted to the defendants by the 1975 Agreement expired on August 31, 1979 and that the plaintiffs are and have been since such date entitled to possession of the quarry; (c) an injunction as claimed in the statement of claim; and (d) costs. The counterclaim of the defendants is dismissed with costs.

Claim allowed.

Counterclaim dismissed.

Solicitors: *P.T. Wong & Co.; Lee Bon Leong & Co.*

MALAYSIAN REPORTS

GOVINDJI & CO v. SOON HIN HUAT

[F.C. (Raja Azlan Shah C.J., Abdul Hamid F.J. & Abdoolcader J. November 18 & December 2, 1981]

[Penang — Federal Court Civil Appeal No. 63 of 1981]

Contract — Illegality — Contract for sale of copra — Buyer not licensed — Coconut Marketing Scheme, 1973, para. 4(1)(a) — Federal Agricultural Marketing Authority Act, 1965, s. 5.

The appellants had entered into three contracts with the respondents for the sale of copra. Copra was delivered under the first contract, but there was an overpayment of the sum of $10,597.60. No copra was delivered in respect of the second and third contracts. The appellants brought an action against the respondents claiming the sum of $10,597.60 for money had and received and also damages for loss in respect of the second and third contracts. Arulanandom J. entered judgment for the appellants for money had and received but dismissed the rest of the claim. The appellants appealed.

Held, dismissing the appeal: as the appellants did not have a licence to purchase copra, the contracts entered into were clearly in contravention of the law such that the consideration was unlawful and therefore void.

Cases referred to:

(1) *Anglo-American Corp. Ltd.* v. *Singapore Produce Co.* [1962] M.L.J. 399.

(2) *In re Anglo-Russian Merchant Traders and John Batt & Co. (London)* [1917] 2 K.B. 679.

HIGH COURT.

S. Thillaimuthu for the plaintiffs.

T.R. Hepworth for the defendants.

Cur. Adv. Vult.

Arulanandom J.: This was a claim by the plaintiffs for damages, the sum of $10,592.60 as money had and received, interest and costs against the defendants who it was alleged had failed to perform certain contracts of sale of non-black fully dry copra in hemispheric form and without pieces. According to the plaintiffs by the first contract in writing No. 1156 dated May 25, 1973 the defendants sold and agreed to deliver 504 pikuls of the said copra at the price of $44 a pikul at Weld Quay on or before August 31 but only delivered a total of 348 pikuls between September 1973 and April 1974 leaving a balance of 155.40 pikuls undelivered. Again by Contract No. 1157 dated June 25, 1973 the defendants sold and agreed to deliver 420 pikuls of the said copra at $47.75 per pikul at the same place before October 31, 1973 but no copra was delivered. Again by Contract No. 1158 dated July 28, 1973, the defendants sold and agreed to deliver 420 pikuls of the copra at $56 per pikul at the same place before December 31, 1973 but no copra was delivered. In the process the plaintiffs had overpaid the defendants by the sum of $2,597.60 on Contract No. 1156, and made advance payments of $3,000 on Contract No. 1157 and $5,000 on Contract No. 1158, thus leaving the amount of $10,597.60 in the hands of the defendants as money had and received. The damages the plaintiffs were claiming was the difference between the market price and the contract price of the said copra at the relevant dates which according to the plaintiffs' claim amounted to $59,081.

There is no dispute between the parties as regards payment and non-delivery of the said copra on the

three contracts. But the plaintiffs claim that defendants' letter of May 8, 1974 (page 20 of the Agreed Bundle) where they refused to deliver any more copra because of the plaintiffs' failure to take delivery of orders and non-payment for certain deliveries constitute a breach of the contracts.

The defendants averred that in addition to the contracts it was orally agreed that as far as delivery was concerned time would not be of the essence. Furthermore they contend that as all the contracts contain a condition that "In the event of the buyers failing to take delivery, sellers have the option of cancelling the contract or of selling out against this contract, all losses incurred to be for account of the buyers" it was evident that the sellers would have the option of treating the buyers' failure to take delivery as a repudiation of the contract. Furthermore the defendants contended that the failure to make payment for the last two deliveries of copra was a breach of contract.

The whole question of liability hinges on whether it was the defendants who breached the contract by non-delivery of the goods or whether it was the plaintiffs who committed the breach by not taking delivery of the goods.

While the plaintiffs claimed it was the defendants who failed to deliver the defendants contended that the failure was the plaintiffs' who did not take delivery. From the defendants' evidence the plaintiffs had placed the orders with the defendants for the purpose of exporting the copra overseas and that this was a condition of the sale agreement as otherwise the defendants' own business, that of a copra dealer, locally would be affected. That being so the plaintiffs had to ensure that shipping space was available and letters of credit had been opened. Plaintiffs' counsel objected to the admission of this part of the evidence on the ground that since the contract was in writing, it was inadmissible under section 91 of the Evidence Act. But this court was of the opinion that it was clearly admissible under proviso (b) of section 92 of the Act which reads as follows: —

"the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;"

The documents relied on by the plaintiffs contained the barest of particulars. And the dates on which they took deliveries only give credence to the defendants' contention that there was a collateral oral agreement regarding deliveries. Plaintiff himself admitted that he had no godown in Weld Quay where goods could be delivered or stored, and delivery was made in an open space near the Customs Office which dealt with goods for export. This supports the defendant's evidence that it was only when the plaintiffs had secured shipping space for the copra that they would require the defendants to deliver the amounts they had arranged to be exported at Weld Quay where the Customs could clear the goods for export and the goods loaded onto the ships. Furthermore from the defendants' stock book it was evident that on the dates plaintiffs complained that the defendant failed to deliver he did have stock of the said grade of copra in his store. Another curious fact is that while the earlier contracts had not been performed, the plaintiffs were still entering into further contracts.

Again to prove damages the onus of which was on the plaintiffs, there was no documentary evidence, no copies of letters of credit, contract notes, invoices or receipts to show that they had suffered loss through being unable to fulfil contracts because of the failure of the defendants to deliver the copra.

The only conclusion that one can arrive at is that the price of copra having risen far above the prices stated in the contract the plaintiffs were trying to take advantage of their own failure to take delivery by alleging the defendants had committed breaches of contract.

The question of legality of the contract was raised as at the time the contracts were signed the plaintiffs had no licence to sell copra. Para. 4(1)(a) of the Coconut Marketing Scheme 1973 dated April 27, 1973 (prescribed under section 5 of the Federal Agricultural Marketing Authority Act 1965) which came into force on May 1, 1973 provided that no person shall for the purpose of trading or processing, purchase from a coconut farmer any copra ... unless he is licensed to do so by the Board (The Agricultural Produce Marketing Board established under section 6 of the Act). The plaintiffs by their own evidence admitted they had no licence to purchase copra and hence any sales agreement entered into by them contrary to the law would make the consideration unlawful and thereby void.

The plaintiffs contend that since section 5(4) of the Act provides that "any discretion conferred on any person to issue or refuse a licence to deal in any marketing scheme prescribed under this section shall be so exercised as to allow issue of licence to any person who immediately before coming into force of the scheme was lawfully dealing in the marketing of such product" the fact that the plaintiffs had been dealing in copra for several years before the scheme came into force excludes them from the provisions of the scheme, especially as they were not aware of it until this case came up for hearing in 1976 and the defence of illegality was raised. I cannot agree. While the fact the plaintiffs were *bona fide* dealers in copra before the coming into force of the scheme may be taken into account if plaintiffs were prosecuted under the Act for dealing in copra without a licence, it cannot legalize a contract which plaintiffs entered in breach of the provisions of the laws.

The defendants further contended that they were entitled to forfeit the monies of the plaintiffs held by them as the plaintiffs were in breach of the agreements. There is no provision in the agreement for forfeiture of monies held by the defendants nor is there any counterclaim by them for losses suffered through the plaintiffs not taking delivery of the goods they ordered.

For the reasons stated above judgment will be entered for the plaintiffs in respect of prayer 2 for money had and received and the rest of the claim dismissed.

As to costs the defendants will pay to the plaintiffs one quarter of the plaintiffs' taxed costs and the plaintiffs pay to the defendants three quarters of the defendants' taxed costs.

From the above judgment the plaintiffs appealed to the Federal Court.

FEDERAL COURT.

S. Thillaimuthu for the appellants.

T.R. Hepworth (*N. Patkunam* with him) for the respondents.

Cur. Adv. Vult.

Abdul Hamid F.J. (delivering the judgment of the Court): The appellants Govindji & Company entered into three contracts Nos. 1156 (25.5.73), 1157 (25.6.73) and 1158 (28.7.73) with the respondents Soon Hin Huat for sale of copra for a fixed price per pikul to be delivered on or before August 31, 1973, before October 31, 1973 and before December 31, 1973 respectively. A total of 348 pikuls were delivered under the first contract between September 1973 and April 1974, leaving a balance of 155.40 pikuls undelivered. No copra was delivered in respect of second and third contracts. In the process there was an overpayment of a sum totalling $10,597.60 to the respondents.

In an action against the respondents, the appellants claimed a sum of $10,597.60 for money had and received and damages arising for loss of difference below the market and contract prices assessed on the dates of the breaches of the contracts amounting to $59,081.40 and 6% interest in the sum of $10,597.60 as from May 8, 1974.

The learned judge Arulanandom J. entered judgment for the appellants for money had and received and dismissed the rest of the claim. Hence the appeal.

The central issue in this appeal revolves around the question of legality of the contracts in the light of para. 4(1)(a) of the Coconut Marketing Scheme 1973 dated April 27, 1973 prescribed under section 5 of the Federal Agricultural Marketing Authority Act 1965 which came into force on May 1, 1973 which provides that no person shall, for the purpose of trading or processing, purchase from a coconut farmer any copra ... unless he is licensed to do so by the Board established under section 6 of the Act.

Before we deal with this question, it is pertinent to mention in passing that the learned judge made specific findings of fact to the effect that it was the appellants who failed to take delivery of the goods when he considered whether it was the respondents who breached the contract by non-delivery of the goods or the appellants for not taking the delivery.

On the question of legality of the contract the learned judge expressed the view that:

"The plaintiffs by their own evidence admitted that they had no licence to purchase copra and hence any sales agreement entered into by them contrary to the law would make the consideration unlawful and thereby void."

Of the appellants' contention that by reason of section 5(4) of the Act which provides that "Any discretion conferred on any person to issue or to refuse to issue a licence to deal in any agricultural produce, under any marketing scheme prescribed under this section shall be so exercised as to allow the issue of a licence to any person who immediately before the coming into force of the scheme was lawfully dealing in the marketing of such produce," and the fact that the appellants had been dealing in copra for several years before the scheme came into force should exclude them from the provisions of the scheme, the learned judge formed the view that it cannot legalise a contract which the appellants entered in breach of the provisions of law.

On appeal before us, it is the appellants' contention, the same point raised in the court below, that the contracts were forward contracts and therefore no licence was required except at the time of the completion of the contract when taking delivery of the goods under the contract. A Singapore case of *Anglo-American Corp. Ltd.* v. *Singapore Produce Co.*[1] was cited in support of the contention.

Mr. T.R. Hepworth counsel for the respondents in his submission quite rightly pointed out that in that case the defendant buyers admitted the contract and that they bought the rubber but they refused to take delivery as they contended that the contract was illegal because they were not licensed under the Rubber Dealers Ordinance to purchase rubber. And it was in that context that Buttrose J. held that it was only when the purchaser sought to take delivery of specific rubber by way of completion of the contract to purchase that he was bound to have a licence to take delivery. The distinction lies in the fact that in the present case the appellants (buyers) were suing on contracts in respect of which they were bound to have a licence to take delivery but which they did not have. In effect the appellants never had any licence to purchase copra indeed were not even aware of any legal requirement of a licence to purchase copra until the case came up for hearing in 1976. The question therefore of applying for or obtaining a licence did not arise.

A further important distinction that can be drawn in the present case from the *Anglo-American Corporation's* case is that the contract there was a forward F.O.B. contract executory in its terms which did not involve delivery at the time it was made whereas this is not so here. All the three contracts were effective on the dates they were entered into and at the option of the appellants they were entitled to require delivery of the copra at any time on or before the specified date. The terms of the contracts were such that it was a purchase followed by delivery. It means in effect the appellants were not precluded from requiring the respondents to effect immediate delivery. Such being the case, the question is whether the appellants were at all relevant times legally able to accept delivery. The answer is obvious in that they were unable to do so. An acceptance of any delivery of copra by the appellants pursuant to the contracts entered into would have been a direct violation of the legal prohibition contained in para. 4(1) of the Scheme. And furthermore any delivery of the copra would expose the appellants to prosecution for failure to comply

with the relevant provisions of the Act and they would be liable to a fine or imprisonment.

Our attention has also been drawn to a case *In re Anglo-Russian Merchant Traders and John Batt & Co. (London)*(2) which Mr. Hepworth submitted provides the answer to the question under consideration. It is pertinent to the present case to the extent that if the respondents should effect delivery pursuant to the contracts, there would have been in law a sale of copra, i.e., a purchase by the appellants in breach of the relevant provisions and would constitute an illegal performance of the contract.

On consideration it is our finding that by reason of the fact that the legal prohibition was in existence prior to the contracts being entered into such contracts were clearly in contravention of the law such that the consideration was unlawful and therefore void.

For these reasons, this appeal must fail and it is accordingly dismissed with costs.

Appeal dismissed.

Solicitors: *Thillaimuthu & Phock Kin; N. Patkunam & Co.*

DATUK ABU MANSOR BIN MOHAMED NASIR v. BANK KERJASAMA RAKYAT MALAYSIA BHD. & ANOR.

[F.C. (Wan Suleiman F.J., Mohamed Azmi & Hashim Yeop A. Sani JJ.)
December 5, 1981 & January 15, 1982]

[Kuala Lumpur — Federal Court Civil Appeal No. 12 of 1978]

Practice and Procedure — Attachment before judgment — Application to set aside — Whether person had handed over great deal of his property with intent to obstruct or delay judgment — Whether fresh evidence can be introduced at hearing of application to set aside order for attachment — Debtors Ordinance, 1957, s. 19(1)(c).

In this case the appellant had applied to set aside an *ex-parte* order of attachment before judgment made pursuant to section 19(1)(c) of the Debtors Ordinance at the instance of the respondents and also an *ex parte* order directing the appellant to declare on oath full particulars of his movable and immovable properties and an injunction restraining the appellant until the trial of the civil suit from exercising any powers or rights which he might have as a director or shareholder in any company. The application had been dismissed in the High Court.

Held: (1) Section 19(1)(c) of the Debtors Ordinance 1957 does not debar a person from dealing with his property merely because a suit has been filed against him. There must be additional circumstances before the court can be satisfied that he is disposing of the property with intent to defraud the plaintiff;

(2) in this case there was no evidence on which the learned judge could be satisfied that the appellant had handed over a great deal of his property or money to others with intent to obstruct or delay any judgment which the respondents might obtain against him;

(3) the sales of the lands relied on at the application for attachment before judgment were not ordinary sales from which an intent to obstruct or delay could obviously be drawn. The sales were necessary to avoid foreclosure proceedings by two banks in respect of an unpaid loan;

(4) fresh evidence could not be introduced at the hearing of an application to set aside the *ex-parte* order made in chambers, as such evidence was not before the learned judge and he could not have exercised his discretion in matters unknown to him;

(5) the order requiring the appellant to declare all his assets and the order of injunction were clearly outside the scope of the Debtors Ordinance and must be set aside.

Cases referred to:-

(1) *Kepong Prospecting Ltd.* v. *Schmidt* [1962] M.L.J. 375, 377.

(2) *Nanyang Development (1966) Sdn. Bhd.* v. *Malaysian Armed Forces Co-operative Housing Society Ltd.* [1972] 2 M.L.J. 149.

(3) *Munns* v. *Longden* 32 W.R. 675; 50 L.T. 356.

[The following cases were also referred to in argument: *Hari Singh* v. *Sundarammal* [1965] 2 M.L.J. 174; *Amanullah* v. *Nazir Ahmad* [1969] 2 M.L.J. 1, and *Public Prosecutor* v. *Datuk Haji Harun bin Haji Idris & Ors.* [1977] 1 M.L.J. 180.]

FEDERAL COURT.

K.L. Rekhraj (*Zaitoon Dato Othman* with him) for the appellant.

Mohamed Ismail for the respondents.

Cur. Adv. Vult.

Mohamed Azmi J. (delivering the judgment of the Court): This is an appeal against the decision of a judge dated January 23, 1978 dismissing the appellant's application to set aside an *ex-parte* order of attachment before judgment made on November 16, 1977 in respect of the movable properties of the appellant subject to a limit of $8.3 million. The *ex-parte* order of November 16 was made pursuant to section 19(1)(c) of the Debtors Ordinance 1957, at the instance of the two respondents who are the plaintiffs in Kuala Lumpur High Court Civil Suit No. 2110/1977 in which the appellant as second defendant is being sued with four others, namely Datuk Harun bin Haji Idris (first defendant), Ismail bin Din (third defendant), Tinju Dunia Sdn. Bhd. (fourth defendant) and Citibank N.A. (fifth defendant). By paragraph 1 of the statement of claim endorsed in the general writ of summons issued on July 22, 1977, the first respondent's claim against the appellant, first defendant and third defendant jointly and severally, is for the sum of $7.7 million, and by paragraph 4, the second respondent's claim against the appellant is for the sum of $8.3 million or such other sum as may be found due for loss caused or occasioned to the second respondent by him by breach of trust, alternatively by breach of fiduciary duties or further alternatively by fraud committed on the second respondent.

The respondents' summons in chambers dated November 14, 1977, which was heard *ex-parte* in chambers, was supported by two affidavits — one sworn by Ibrahim bin Hashim, the General Manager and Secretary of first respondent Bank, and the other by Zubir bin Haji Dahan, the Acting Secretary of second respondent company. Based on these two affidavits, it is argued by Mr. Rekhraj, counsel for the appellant, that there was insufficient evidence on which an order of attachment before judgment could have lawfully been made. It is also argued before us that the other *ex-parte* orders made on the same date directing the appellant to declare on oath full particulars of his movable and immovable properties (order No. 2) and an injunction restraining the appellant until